Supreme Court of the United States.

October Term, 1933

No. 121.

THE UNITED STATES, *Appellant*,

v.

MASON AND HANGER COMPANY

No. 122.

THE UNITED STATES, *Appellant*,

v.

NORTHEASTERN CONSTRUCTION COMPANY

Appeals from the Court of Claims.

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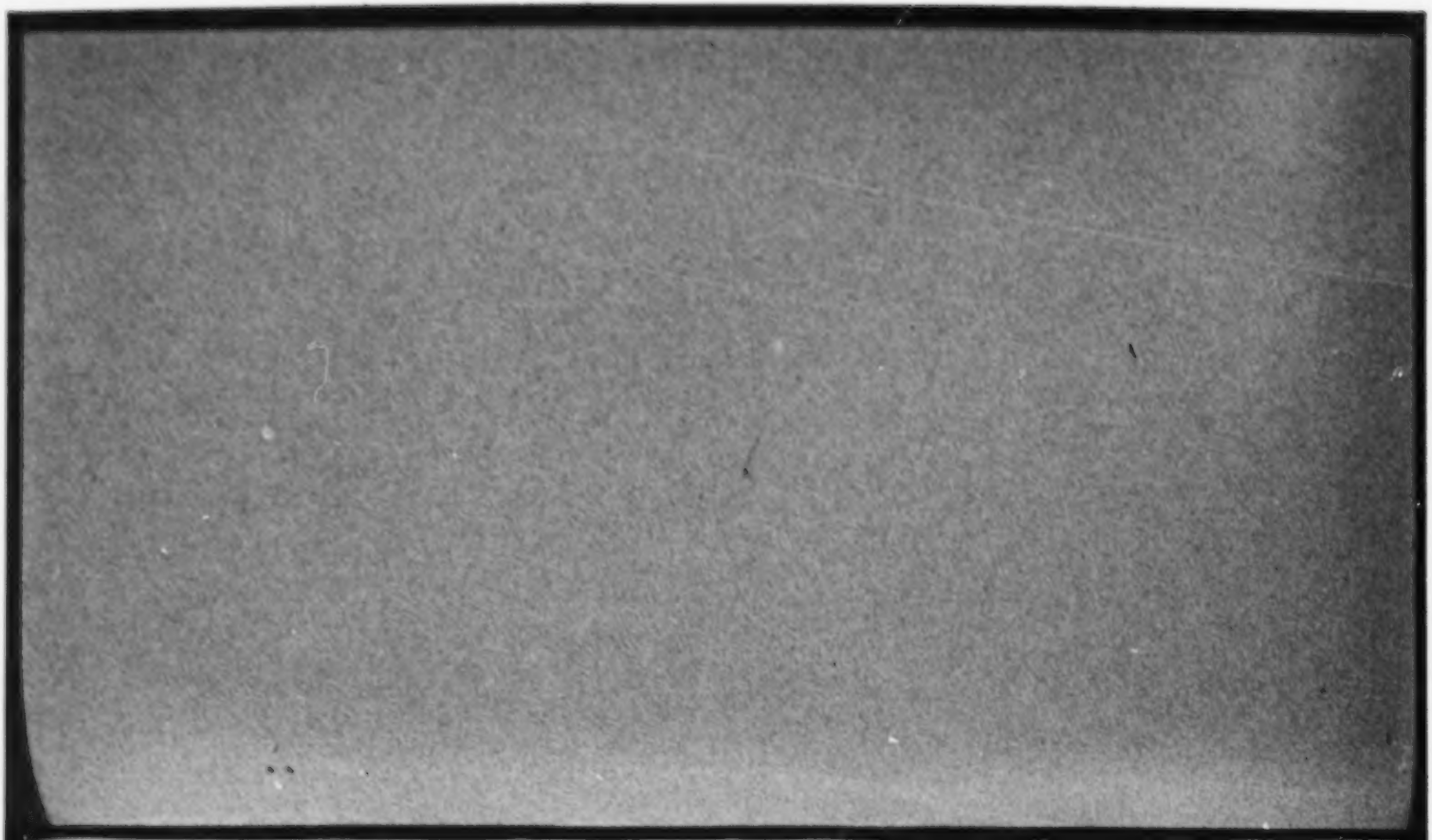

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BRIEF FOR APPELLEES.

I. STATEMENT OF THE CASES.

The statement in brief for the United States (pp. 1 to 8) taken in connection with the contracts (record, *Mason & Hanger*, No. 121, pp. 5-15; record, *Northeastern Construction Co.*, No. 122, pp. 4–13), and the findings of fact (record, *Mason & Hanger*, No. 121, pp. 17 to 19; record, *Northeastern Construction Co.*, No. 122, p. 14), sufficiently state the facts.

The Court of Claims gave judgment in favor of the claimants in the case of *Mason & Hanger Company*, No. 121, for the full amount claimed consisting of three items as follows:

1. Premium on bond of $250,000 given by the contractor to the United States for fulfillment of the contract	$2,500
(Finding III, Rec. p. 18.)	
2. Premium on bond given by the subcontractor to the principal contractor (claimant in this case) for fulfillment of the subcontract	450
(Finding IV, Rec. top p. 19.)	
3. Premiums on policies of public liability insurance, automobile liability insurance, and burglary and holdup insurance	9,114.52
(Finding V, Rec. middle p. 19.)	
	$12,064.52

The case of the *Northeastern Construction Company*, No. 122, involves only a premium on the surety bond given by the main contractor for the performance of the contract and is similar to item 1 of the *Mason & Hanger* case, and amounts to $150, for which judgment was entered (Rec. #122, p. 14).

The opinion in *Mason & Hanger* is by Judge Hay and is reported 56 C. Cls. 238.

The United States does not question the allowance of items 2 and 3 of the *Mason & Hanger* case. The only error alleged is as to the allowance of item 1 of the *Mason & Hanger* case and of the entire amount in that of the *Northeastern Construction Company* (brief for the United States, p. 2).

References throughout this brief, as in the brief for the United States, will be to the *Mason and Hanger* record, No. 121, unless otherwise stated.

II. Brief of Argument.

A Cost Plus Contract.

The contract was of a character little used prior to the declaration of war with Germany, April 6, 1917.

By this form of contract the contractor has before him at the time of signing the contract neither drawings nor specifications, all of which are to be furnished in the future. (See this contract, Rec. one-third down p. 6.) Neither is there even an estimate of the amount or value of the work to be done. The contractor agrees in view of the national emergency requiring immediate performance of the work to put up the required buildings "in the shortest possible time" (Article I, near foot p. 5).

As compensation he is to be reimbursed for the actual net expenses incurred in the performance of the work as may be approved or ratified by the contracting officer. For his own services "including profit and all general overhead expense" he is to receive a fee based upon a sliding scale with a maximum limit (Article III, p. 9).

Statutes as to Surety Bonds.

The act of February 14, 1905, Chapter 778 (33 Stat. 811; Compiled Statutes, Sec. 6923), provides for furnishing bonds for the performance of all work of construction or repair for the government:

"That hereafter any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work, or for repairs upon any public building or public work, shall be required, before commencing such work, to execute the usual penal bond, with good and sufficient sureties, with the additional obligation that such contractor or contractors shall promptly make payment to all persons supplying him or them with labor and materials in the prosecution of the work provided for in such contract."

The contract (Article IX, p. 13), in language closely following that of the statute, also required the contractor to furnish a bond.

The statute with some supplemental provisions for its proper execution is embodied in the Army Regulations, 1913 edition, as Paragraphs 569 to 581. By Par. 569, "The amount of penalty in a contractor's bond will be fixed by the contracting officer," etc., followed by provisions of minimum and maximum limits.

The bond was therefore "required" by the contracting officer within the strictest sense of the term.

The act of August 13, 1894, Sec. 1, Chapter 282 (28 Stat. 279; Compiled Statutes, Sec. 3293), provides that all such bonds must be approved by the proper officer:

"Whenever any recognizance, stipulation, bond, or undertaking conditioned for the faithful performance of any duty, or for doing or refraining from doing anything in such recognizance, stipulation, bond, or undertaking specified, is by the laws of the United States required or permitted to be given with one surety or with two or more sureties, the execution of the same or the guaranteeing of the performance of the condition thereof shall be sufficient when executed or guaranteed solely by a corporation incorporated under the laws of the United States, or of any State having power to guarantee the fidelity of persons holding positions of public or private trust, and to execute and guarantee bonds and undertakings in judicial proceedings: *Provided*, That such recognizance, stipulation, bond, or undertaking be approved by the head of department, court, judge, officer, board, or body executive, legislative, or judicial required to approve or accept the same. But no officer or person having the approval of any bond shall exact that it shall be furnished by a guarantee company or by any particular guarantee company."

The bond was "approved," as required by this act (Finding III, p. 18).

Interest of U. S. in Premium Recognized.

Prior to the dates of these contracts the surety companies had charged a premium of two per cent on the penalty of the bond as a premium (record, p. 18, Finding III, end of first paragraph).

Prior to making any construction contracts the officers of the War Department negotiated with the representatives of the surety companies and induced them to reduce this premium from two to one per cent, the Secretary of War having directed that such premiums should be treated as a part of the cost of the work (same paragraph). At the same time the penalty of the bond to secure the faithful performance of the contract for each of the sixteen great cantonments was fixed at $250,000 (2d paragraph, Finding III, p. 18). Thus the premium to be charged on such a bond was by the arrangement with the surety companies $2,500 each.

The officer in charge of cantonment construction directed the constructing quartermasters for all the cantonments to refuse to accept any bond that did not conform to the above arrangement as to premium (3d paragraph, Finding III, p. 18). Thus the interest of the government in the amount of the premium was recognized from the start.

Pursuant to the requirements of law and of the contract, the claimant company furnished a bond for $250,000, with the Fidelity & Deposit Co. of Maryland as surety (same paragraph). That company charged a premium of $2,500 on the bond, which was duly paid by the claimant company. It was included in a voucher as one of the actual expenditures in the performance of the work and as such was paid by the government in August, 1917, as a part of the costs of the work (same paragraph).

The payment remained undisputed for two years and a half.

More than five hundred construction contracts were similarly made throughout the country and premiums paid by the contractors to secure their bonds for faithful performance of the work. These premiums were reimbursed to the contractors as a part of the cost of the work (end 3d paragraph, Finding III, p. 18).

In January, 1920, after the petition in this case had actually been filed claiming reimbursement for the premiums on the various policies of insurance, it was deducted from another amount accruing in favor of the claimant company in accordance with a decision of the Comptroller of the Treasury adverse to the allowance of such premiums (Finding III, foot p. 18). The petition in this case was thereupon amended to claim the amount of such premium (amended petition, Rec. pp. 2–4, Pars. VII to XI; see Rec. near top p. 18).

Terms of the Contract.

The premium here claimed is precisely and literally within the terms of the contract as a part of the cost of the work to be paid by the United States. One of those costs which the United States agreed to pay is (Rec. top p. 8, Article II):

"(*h*) Such bonds, fire, liability and other insurance as the contracting officer may approve or require."

Article IX, p. 13, specifically requires the contractor to furnish a bond prior to commencing the work.

The act of 1905, *ante*, p. 5, required that a bond be given. That of 1894, *ante*, p. 6, required that it be approved by the contracting officer. This bond "was required and approved by the contracting officer" (Finding III, two-thirds down p. 18). The fact that it was also re-

quired by statute is no objection to its inclusion as a part of the cost of the work. On the contrary, the right is even more clearly apparent when it was not a mere requirement of the contracting officer but was also required by law.

Object of the Contract.

The object to be attained by the contract clearly concurs with the plain construction of the language in requiring the expense of this bond to be borne by the government. The object of the cost plus contract was to secure the speediest possible performance of the work. In the fluctuating conditions of war times contractors were unable to name fixed prices. The cost of labor and materials varied from day to day. Prudent contractors were unwilling to assume obligations to do work of this character for a fixed sum. The government therefore agreed to pay the entire cost of the work and in addition thereto a profit for the use of the contractor's experience, skill, acquaintance with the labor market and facility in handling it, etc. To make a contractor whole for his expense it was just as necessary to reimburse him for the cost of his bond as it was for the cost of the wood and iron which was to enter into the construction. A different interpretation of the contract would compel the contractor to bear a very necessary element of the cost himself and would deprive him to that extent of the stipulated profit.

To be Interpreted as a Whole.

By Article XIV, p. 14, of the contract, it is provided:

"This contract shall be interpreted as a whole and the intent of the whole instrument, rather than the interpretation of any special clause, shall govern."

The contract read in the light of this provision is in-

tended to reimburse the contractor for "such of its actual net expenditures in the performance of said work as may be approved or ratified by the contracting officer" (Article II, Rec. p. 6).

True, a specification of items follows, but this is intended to carry out the general intent to reimburse the contractor. The profit or fee, as it is termed, is given by Article III, p. 9, and is there defined "as full compensation for the services of the contractor, including profit and all general overhead expense."

Not "Overhead Expense" or "Profit."

A definite item of premium for a surety bond required by law and by the contract and which was by law required to be and in fact was approved by the contracting officer is in no sense a "general overhead expense," much less a "profit." It is a direct cost of this contract. To compel the contractor to pay it out of his fee or profit is clearly inconsistent with the general purpose of the contract.

Decision and Payment.

The contract provides, Article IV, pp. 9, 10, for periodical statements and payments. That article provides (Rec. middle p. 10):

"The statement so made and all payments made thereon shall be final and binding upon both parties hereto except as provided in Article XIV hereof."

Article XIV (pp. 14, 15) provides for settlement of doubts and disputes.

It is hard to see how the contract could more positively or more broadly have vested finality of decision in all matters of payment in the contracting officer.

This is but a more positive statement of the same idea already embodied in Article II saying that the contractor is to be reimbursed for such of its expenditures "as may be approved or ratified by the contracting officer."

A decision so rendered is conclusive according to many decisions of this court. *Kihlberg* v. *United States*, 97 U. S. 398, 401; *Martinsburg & Potomac R. R. Co.* v. *March*, 114 U. S. 549, 553; *United States* v. *Gleason*, 175 U. S. 588; *Ripley* v. *United States*, 223 U. S. 425.

A settlement thus made in accordance with a provision of the contract would not be allowed to be disturbed as between private parties or by a private party against the United States. *C. M. & St. P. Railway* v. *Clark*, 178 U. S. 353. No more should the United States be allowed to question the validity of a payment once made under such abundant sanction.

In compliance with the provisions of Articles IV (Record, pp. 9, 10) and XIV (pp. 14, 15), the item claimed was included in a voucher and paid. This action was under the contract conclusive. Where the parties were at the time of settlement and payment agreed upon their respective rights and liabilities a party would not be heard to say, were the case one between individuals, that the approval of the contracting officer was to go for nothing, and that a payment might later be deducted in the course of settling an entirely different account. "The voucher covering both of these deductions, the plaintiff receipted for under protest" (last sentence Finding IV, top p. 19). Such a protest was amply justified.

Contemporaneous Construction.

The premium on the surety bond, as we have seen, was not only ordered to be paid, but was actually paid to the claimant company. Not only was it paid, but it remained in the possession of the contractor for about

two years and a half until it was taken back again. Not only was it paid to this contractor but to about five hundred others. (Finding III, near foot p. 18.)

The minds of the parties met at the time of entering into the contract. And what they meant by the original contract was demonstrated by their subsequent action in carrying it out.

In *Chicago* v. *Sheldon*, 9 Wall. 50, 54, the court said:

"In cases where the language used by the parties to the contract is indefinite or ambiguous, and, hence, of doubtful construction, the practical interpretation by the parties themselves is entitled to great, if not controlling, influence. The interest of each, generally, leads him to a construction most favorable to himself, and when the difference has become serious, and beyond amicable adjustment, it can be settled only by the arbitrament of the law. But, in an executory contract, and where its execution necessarily involves a practical construction, if the minds of both parties concur, there can be no great danger in the adoption of it by the court as the true one."

In *Insurance Co.* v. *Dutcher*, 95 U. S. 269, 273:

"The practical interpretation of an agreement by a party to it is always a consideration of great weight. The construction of a contract is as much a part of it as anything else. There is no surer way to find out what parties meant, than to see what they have done."

According to this rule the practical construction placed by both parties to the contract upon it when it was in process of execution would be conclusive were it otherwise doubtful.

Bonds as Court Costs.

In *The South Portland*, 95 Fed. 295, the claimant, the owner of a libeled vessel, gave a bond for her release. Ultimately a decree was rendered in his favor dismiss-

ing the libel with costs. It was held that as the bond was obtained from a surety company which in the regular course of business charged a premium for it, the expense was a legitimate item in the taxable costs. After referring to the change of practice in modern times whereby such bonds instead of being obtained from wealthy friends of the litigant as a matter of accommodation, are furnished by surety companies as a business for such premiums, the court said (p. 296):

"In communities where business methods conform to modern customs, such expenditures as are the subject of dispute on this hearing, are in fact necessary, and every reason for allowing the prevailing party to recover other necessary expenditures in maintaining his rights in a litigated case applies with equal force in favor of exercising the discretion vested in courts of admiralty by awarding to the prevailing party, as part of his taxable costs, the amounts actually paid to surety companies for giving bonds and stipulations exacted by the defeated party."

This was reaffirmed in the case of *The John D. Shelby*, 158 Fed. 662, where the court said (p. 663):

"The entire proceeding, therefore, seems to be justifiable and legal, and the premium paid for the bond should be taxed, if reasonable in amount. Discretion is vested in the court to prevent the payment of unwise and extravagant premiums, assented to upon the theory that they were taxable in any event. The burden rests upon the losing party to object, if an unreasonable agreement has been made for the payment of a premium and the amount to be taxed should be only such an amount as is customary or reasonable under the circumstances of the case."

History of Contingents.

It is stated in the brief for the United States, p. 10, that the cost-plus system of contracts was "in every

cases enormously and unconscionably profitable to the contractors." This, so far as it is a statement of fact, is not only not supported by any evidence but is directly refuted by an official publication, "America's Munitions, 1917–1918, Government Printing Office, 1919, Book VI, Construction Division, p. 533, Chapter I, Cantonments and Camps, pp. 533–547.

It is there said among many other statements of interest:

"Efficiency in war is a matter of teamwork. Every vital branch of the military organization must do its part well if the whole effort is not to fail. The weak link in the chain might well have been the construction organization of the Army, for here was an emergency job on a scale beyond anything in the experience of our greatest builders. America in her first 18 months of war was able to send to France across 3,000 miles of dangerous water more men than the United Kingdom in a similar period could send to the front over the netted and laned 40 miles of English Channel. No slight share of the credit for this achievement must go to the cantonment builders, who despite great difficulties had the housing ready for the new armies when they were called forth for training" (p. 537).

"There had been, however, a measure of pioneering in several of these directions. The Council of National Defense had an organization of civilian experts in many lines gathered together in Washington to give advice to the military authorities. Through its committees the council prepared a form of contract upon what came to be known as the 'cost-plus with sliding scale and fixed maximum fee' plan, which limited the cantonment contractor in each case to a maximum fee of not more than $250,000, the Army itself retaining control of the cost of materials and the wages paid to labor.

Since the cantonments cost anywhere from $8,000,000 to more than $12,000,000 each, the average fee to the contractor was slightly less than 2½ per cent, out of which the contractor had to pay overhead expenses, such as his main office expenses and the like; so it will

be seen that the United States drove a close bargain with its cantonment builders in spite of the breathless haste to get the work done" (p. 539).

"Only a builder of secure financial standing could handle such a construction contract. Frequently his pay-roll and current bills for supplies amounted to half a million dollars in a week. Let the government delay a few days in its payments to him and he might find himself obliged to raise a million dollars in cash on the instant to meet his immediate obligations."

"The race was a close one, being won by Camp Taylor, at Louisville, which was 79.4 per cent complete on the day the contest ended, lacking only six-tenths of 1 per cent of coming up to the maximum 80 per cent of completion regarded as possible in the time available" (p. 542).

The last paragraph above quoted shows that the work on this particular cantonment stood at the head of all in promptness and efficiency of construction.

CONCLUSION.

The judgment should be affirmed.

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